

**MINUTES OF THE OPEN SESSION
OF THE RHODE ISLAND ETHICS COMMISSION**

April 21, 2009

The Rhode Island Ethics Commission held its 6th meeting of 2009 at 9:00 a.m. at the Rhode Island Ethics Commission conference room, located at 40 Fountain Street, 8th Floor, Providence, Rhode Island, on Tuesday, April 21, 2009, pursuant to the notice published at the Commission Headquarters and at the State House Library.

The following Commissioners were present:

Barbara R. Binder, Chair Deborah M. Cerullo SSND

Ross Cheit, Vice Chair Edward A. Magro

J. William W. Harsch, Secretary Mark B. Heffner

James V. Murray John D. Lynch, Jr.

Also present were William J. Conley, Jr., Commission Legal Counsel; Kent A. Willever, Commission Executive Director; Katherine D'Arezzo, Senior Staff Attorney; Staff Attorneys Jason Gramitt and Dianne L. Leyden; and Commission Investigators Steven T. Cross, Peter J. Mancini and Gary V. Petrarca.

At 9:00 a.m., the Chair opened the meeting. The first order of business was the administration of the oath of office to newly

appointed Commissioners Mark B. Heffner and John D. Lynch, Jr.

The next order of business was approval of minutes of the Open Session held on March 24, 2009. Upon motion made by Commissioner Magro and duly seconded by Commissioner Murray, it was unanimously

VOTED: To approve minutes of the Open Session held on March 24, 2009.

ABSTENTIONS: Deborah M. Cerullo SSND, John D. Lynch, Jr. and Mark B. Heffner.

The next order of business was advisory opinions. The advisory opinions were based on draft advisory opinions prepared by the Commission Staff for review by the Commission and were scheduled as items on the Open Session Agenda for this date. Staff Attorney Gramitt noted that one of the Petitioners, Christopher Warfel, was not present, but he had indicated a desire to present additional information to the Commission. He stated that Mr. Warfel lived on Block Island and may be on the way. Chair Binder suggested that the Commission hold the advisory opinion until after Executive Session to allow Mr. Warfel additional time to arrive.

The first advisory opinion was that of Michael D. Evora, Esq., the Executive Director of the Rhode Island Commission for Human Rights. The Petitioner was present along with Cynthia Hiatt, Esq.

Staff Attorney Gramitt presented the Commission Staff recommendation. Commissioner Harsch inquired as to the difference between a gift and an honorarium. Staff Attorney Gramitt replied that an honorarium is generally given to an individual in recognition for something the individual has done. He stated that, while the subject donation may be an honorarium under a dictionary definition, it does not fall within the Code's definition given that it is not given to an individual. Commissioner Harsch questioned why it would not be deemed a gift. Staff Attorney Gramitt advised that, while it may be a gift under common parlance, under the Code a gift is only given to an individual.

In response to Commissioner Cerullo, the Petitioner indicated that Rhode Island for Community and Justice (RICJ) could be described as an advocacy group. Upon motion made by Commissioner Magro and duly seconded by Commissioner Murray to approve the draft opinion, there was discussion. Commissioner Cerullo expressed her discomfort with approving the opinion based upon the appearance of impropriety, particularly due to the Petitioner's statement that the group could be considered an advocacy group. The Petitioner clarified that RICJ does not advocate for or represent individuals before the Human Rights Commission in any capacity. In response to Commissioner Cheit, the Petitioner stated that he had no prior discussions with the donor about the money, which he did not know was being sent. Commissioner Cheit commented that it seems odd that it would be called an honorarium where it goes to the

Commission, not the individual.

Commissioner Harsch inquired if the Commission Staff is satisfied with the Petitioner's representations that the funds do not come with strings attached. Staff Attorney Gramitt replied that he relies upon the Petitioner's representations, which he has no reason to doubt. Commissioner Heffner questioned where this might lead in other situations with less benign facts. He expressed that he would find it troubling if advocacy groups were allowed to give honoraria or gifts to state agencies. Staff Attorney Gramitt noted that there could be circumstances in which the Commission would not be comfortable with granting approval. Here, he noted that there are unique circumstances, including the fact it is out in the open and the Petitioner has come to the Commission. Staff Attorney Gramitt indicated that, although the situation might present an appearance issue under a certain set of facts, the Staff is limited in applying the Code of Ethics to the facts. He expressed the Staff's legal opinion that the sections of the Code pertaining to gifts and honoraria do not apply here because the contribution is not to an individual.

Commissioner Heffner inquired if the Staff's opinion would change if a law firm appearing before the CRMC made a donation on behalf of an individual at the CRMC. Staff Attorney Gramitt replied that he did not believe it would, as a gift to the CRMC is a gift to the state. Commissioner Cheit noted that the letter sent by the donor stated that they look forward to continuing to work with the Petitioner. The

Petitioner explained that he would be taking information from the DMC study and working with the Collaboration on a research project. In response to Commissioner Cheit, the Petitioner stated that the end result would be a recommendation to others, not any state action. Chair Binder and Commissioner Cheit replied that would seem to make a difference.

Chair Binder questioned whether the Petitioner would be able to impact the RICJ in his official capacity. Commissioner Cheit inquired what would happen if the RICJ in some way endorsed a complaint before the Human Rights Commission. The Petitioner stated that he would consider recusing, as he has in the past. Commissioner Cerullo voiced that the fact that the entire Commission receives the contribution raises a flag of caution to her. In response to Commissioner Cheit, Staff Attorney Gramitt advised that the Code would prohibit the Petitioner's receipt of an honorarium individually. He stated that neither section of the Code refers to a public entity or state department. He noted that the RICJ is not currently an interested person, but potentially anyone in the state could be. Chair Binder inquired if the membership would be more comfortable if the check were made out to the State of Rhode Island, rather than the Human Rights Commission. The consensus was in the negative.

In response to Commissioner Heffner, Staff Attorney Gramitt explained that each opinion only applies to the individual petitioner to whom it is issued and, although one opinion is not binding on

another, the Commission does try to act consistently. Executive Director Willever indicated that advisory opinions do not involve investigative proceedings, but he noted that in reviewing the draft opinions he does consider application of the law beyond the Code of Ethics, such as, in this instance, federal anti-augmentation statutes. Commissioner Cheit stated that there seems to be an appearance of impropriety question, but he does not believe that it is prohibited by the Code. He indicated that he might be more concerned under other facts. In response to Commissioner Cerullo, he commented that it could not be an honorarium because the Petitioner did it on state time. Chair Binder expressed that she is not really concerned with the appearance issue under these facts. Upon the original motion, it was

VOTED: To issue an advisory opinion, attached hereto, to Michael D. Evora, Esq., the Executive Director of the Rhode Island Commission for Human Rights.

AYES: James V. Murray, Ross Cheit, Edward A. Magro, J. William W. Harsch, Mark B. Heffner, John D. Lynch, Jr. and Barbara R. Binder.

NOES: Deborah M. Cerullo SSND.

The next advisory opinion was that of Frank T. Caprio, the General Treasurer for the State of Rhode Island. Staff Attorney Gramitt presented the Commission Staff recommendation. The Petitioner

was not present. In response to Chair Binder, Staff Attorney Gramitt indicated that the Petitioner represented that he has not received campaign contributions from the PCU or any PAC's. He stated that he did not know whether any individual board members had made contributions. Chair Binder wondered whether the Petitioner would represent that he would not take such contributions. In response to Commissioner Cheit, Staff Attorney Gramitt stated that the Staff does not offer the Commission any opinion as to whether or not an appearance of impropriety exists under the Code.

In response to Commissioner Cheit, Staff Attorney Gramitt informed that the Commission website contains a link to the COGEL website. Commissioner Cerullo inquired whether the credit union has an interest in decisions made by the Treasurer. Chair Binder suggested continuing the matter to the next meeting so that the Petitioner may attend and answer questions. Commission Harsch stated that he wants to know the extent to which state funds are deposited at the credit union. Commissioner Heffner stated that he wants to know if there are any other links to financial institutions currently on the website.

The next order of business was a Legislative Update. Staff Attorney Gramitt informed that Representative Segal introduced House Bill 6070, which proposes an amendment to the Rhode Island Constitution to expressly state that the Code of Ethics would apply to legislators, notwithstanding the provisions of the Speech in Debate

Clause. He indicated that the House likely will wait to see what happens with the upcoming Irons argument before the Supreme Court.

The next order of business was a review of past advisory opinions allowing a public official who is a union member to participate in contract negotiations with a different local bargaining unit of the umbrella union. Chair Binder stated that she asked Staff to put this on the agenda, including advisory opinions issued and related minutes, as it is an issue that has come up quite a few times. Staff Attorney Gramitt explained that, at least since the 1986 advisory opinion, the Commission has allowed such participation because the official does not stand to be financially impacted in one municipality by his official action in another. He also indicated that being a mere member of an organization does not constitute a business association under the Code; however, he noted that the opinions have included the caveat that they could change if the members' relationships with the unions change.

Chair Binder observed that, with respect to the most recently issued opinion, the petitioner herself stated that she believed there to be a conflict. She also noted that another recent opinion involved the appearance of a business agent for two locals, who potentially could be representing the School Committee member regarding a grievance in another municipality. She suggested that the Commission obtain further information on the issue, such as to whom union dues are

paid, and request written public comment, for discussion at the next meeting.

Commissioner Harsch expressed his concern regarding the level to which the union seems to really be represented by the state organization for the purpose of negotiations. Chair Binder requested that the Staff send letters to various unions asking them to explain the interplay between the local and national unions. She also requested that Common Cause and Operation Clean Government be asked for their input. Staff Attorney Gramitt indicated that additional time would be required to obtain the information. Legal Counsel Conley suggested that the Commission also obtain information from the Rhode Island Superintendents Association and the School Committee Associations. In response to Commissioner Harsch, Staff Attorney Gramitt stated that groups who have expressed an interest in being notified of such actions will automatically be notified, such as the League of Cities and Towns. He indicated that such discussion would be scheduled for at least two meetings out.

Upon the arrival of Mark A. Dingley, Chief of Staff/Chief Legal Counsel to the General Treasurer, the next order of business was continued discussion of the advisory opinion request of Frank T. Caprio, the General Treasurer for the State of Rhode Island. In response to Commissioner Cheit, Mr. Dingley informed that a person with whom the Treasurer's Office has worked with on financial literacy in the past advised them of the program. He stated that, to his knowledge, the

Pawtucket Credit Union (PCU) is the only credit union participating in the program. In response to Commissioner Harsch, Mr. Dingley stated his belief that the program was put together by the PCU, rather than being something offered by the National Endowment for Financial Education. Mr. Dingley stated that, upon consultation with the Petitioner's campaign, he is not aware of any PCU board members or executives who have contributed to the campaign. In response to Chair Binder's inquiry regarding what the Petitioner would do if such contributions were subsequently made, Mr. Dingley indicated that he did not know, unless the Commission believes it would be an issue.

Commissioner Heffner questioned whether there would be any different yield between a link to the PCU and a link to the National Endowment. Mr. Dingley replied that he is not aware of a specific National Endowment program with which the Treasurer's Office could establish a link. In response to Commissioner Cheit, Mr. Dingley represented that, to his knowledge, the Treasurer's Office does not make deposits in or have any financial relationships with any credit unions. He further stated that they do not exercise any regulatory oversight over credit unions. Chair Binder voiced her concern about campaign contributions. Staff Attorney Gramitt distributed to the membership a print out of the subject link. Commissioner Heffner stated that there would seem to be a distinction if there is a link to a one page document pertaining to an educational program versus a link to the PCU website.

Commissioner Cheit observed that you would have to contact the PCU to get further information. Chair Binder expressed that she previously served as Chief of Staff to a General Treasurer and the situation is worrisome to her. Commissioner Cheit commented that there is an appearance issue with respect to some relationship between the PCU and the General Treasurer. He questioned how it would appear to another credit union and inquired whether the one page of information could be promoted without endorsing the PCU in the process. Commissioner Heffner indicated that he did not find the contact information particularly troublesome, but he questioned what would happen if another private entity wanted to have specific program information available through the General Treasurer. Commissioner Cheit questioned whether it could be accomplished through the Association of Credit Unions. Commissioner Heffner noted that the Commission would not want to discourage entities from being community minded.

Commissioner Cerullo cautioned that they do not know if other organizations might want to provide such information; she suggested that she would be more comfortable with looking at the whole landscape and see who offers such programs or information. Chair Binder agreed. Mr. Dingley stated that the provision of such information is not something they have regularly done in the past. Commissioner Cheit noted that it is a program linked to one particular business. In response to Commissioner Lynch, Mr. Dingley stated

that the Treasurer's Office did have someone familiar with the program review it before establishing the link. He represented that no one else has come forward with a similar program. Upon motion made by Commissioner Magro and duly seconded by Commissioner Murray, it was

VOTED: To approve the draft advisory opinion.

AYES: John D. Lynch, Jr. and Mark B. Heffner.

NOES: James V. Murray, Edward A. Magro, Ross Cheit, Deborah M. Cerullo SSND, J. William W. Harsch and Barbara R. Binder

The advisory opinion did not issue due to a lack of five affirmative votes.

At approximately 10:05 a.m., upon motion made by Commissioner Murray and duly seconded by Commissioner Cheit, it was unanimously

VOTED: To go into Executive Session pursuant to R.I. Gen. Laws § 42-46-5(a)(2) and (4), to wit:

a.) Motion to approve minutes of Executive Session held on March 24, 2009.

b.) Status Update: William V. Irons v. The Rhode Island Ethics Commission, No. 2008-335-M.P. and 2009-01-M.P.

c.) Status Update: Jason E. Ferrell v. Frank Caprio, Jr., et al., U.S. District Court C.A. No.08-378S

d.) Motion to return to Open Session.

The Commission returned to Open Session at approximately 10:10 a.m. The next order of business was a motion to seal minutes of the Executive Session held on April 21, 2009. Upon motion made by Commissioner Murray and duly seconded by Commissioner Cerullo, it was unanimously

VOTED: To seal minutes of the Executive Session held on April 21, 2009.

Chair Binder reported that the Commission approved minutes of the Executive Session held on March 24, 2009 and received status updates on William V. Irons v. The Rhode Island Ethics Commission and Jason E. Ferrell v. Frank Caprio, Jr.

The next advisory opinion was that of Christopher Warfel, a member of the Town of New Shoreham Electric Utility Generation Task Group. The Petitioner was not present. Staff Attorney Gramitt advised that the Petitioner previously expressed his belief that he has information

which would convince the Commission not to issue the draft opinion. He advised that he had informed the Petitioner last week that the matter was being placed on the agenda and that he had expected the Petitioner to contact him if attendance was a problem. Staff Attorney Gramitt stated that he sent the Petitioner an email yesterday and also called him this morning, to which he has received no replies. In response to Chair Binder, Commissioner Magro suggested that the Commission proceed. Commissioner Cheit noted that the Petitioner initially had declined to write the RFP. He stated that the Petitioner could have come to the Commission back then to receive guidance. Staff Attorney Gramitt stated that, if he had, the opinion would have been that the Petitioner could not draft the RFP if he were going to bid on it.

In response to Commissioner Cheit's inquiry regarding any possible application of hardship, Staff Attorney Gramitt stated that this is not a 5(e) issue. In further response, he stated his belief that the Petitioner's additional information may relate to his unique expertise in the field and the fact that he is a local on the island. Commissioner Cheit inquired whether, based upon the Petitioner's representation about writing the RFP using prior templates, the Staff could have drafted the RFP, for example. Staff Attorney Gramitt stated his assumption that he would not have been able to do so. Commissioner Cheit commented that they could have gone off island for the RFP. Upon motion made by Commissioner Cheit and duly seconded by Commissioner Magro, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Christopher Warfel, a member of the Town of New Shoreham Electric Utility Generation Task Group.

The next order of business was a Request for Exemption under the Public/Private Partnership Act, R.I. Gen. Law § 16-59-26, regarding Anne De Groot, M.D. and Leonard Moise, Ph.D. Staff Attorney Gramitt advised that the parties were notified and, although no one is present, URI officials previously have been in attendance for such matters. He explained that if the Commission is satisfied, it need take no action and the exemption is automatically approved in thirty days. However, the Commission could require that the Board of Governors have a public meeting to reconsider the exemption. Commissioner Cerullo inquired if it would be common that the researcher's company would be involved. Staff Attorney Gramitt stated that he believes it is common for a researcher to have a private company, but the relationship with the company and the university would likely differ in each situation. In response to Commissioner Harsch, he stated that no concerns have been raised thus far in the process. The Commission took no action.

The next order of business was the Director's Report. Executive Director Willever reported that there are two complaints and four advisory opinion requests pending, and there have been no formal APRA requests since the last meeting. He introduced Gary V.

Petrarca, who was recently hired as Investigator I. Director Willever advised that the Investigative Staff recently provided ethics training to the Bristol Police Department. He advised that the 2008 Financial Statements are due on Friday, April 24th.

Director Willever informed that the Commission is tentatively scheduled for a budget hearing before the House Finance Committee on May 4th. He stated that, although the Commission will continue to retain all twelve FTE's, there will be no out of state travel permitted, unless it is revenue generating, and no additional funding has been authorized for a laptop computer. He expressed his appreciation to the Governor's Office and the Legislature for giving the Commission fair consideration in difficult financial times. In response to Commissioner Harsch, Director Willever clarified that the Staff is not presently utilizing their personal laptops for Commission business.

In response to Commissioner Heffner, Director Willever provided information regarding the annual Council on Governmental Ethics Laws (COGEL) conference, at which Staff has previously served as speakers. He indicated that there has been a lot of interest in the Irons case this year and he would not want Rhode Island to be the only state not represented. However, he stated that the Commission pays for its own travel and registrations and it does not appear, at this juncture, that there will be funding.

The next order of business was New Business. Chair Binder

reminded the membership that the Financial Statements are due by Friday.

At approximately 10:38 a.m., upon motion made by Commissioner Cheit and duly seconded by Commissioner Magro, it was unanimously

VOTED: To adjourn.

Respectfully submitted,

J. William W. Harsch

Secretary